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# Establishing Paternity Under the Indian Child Welfare Act

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# Establishing Paternity Under the Indian Child Welfare Act

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## I. INTRODUCTION

Courts interpreting the Indian Child Welfare Act of 1978 (ICWA) must wade through a muddled mixture of policies and precedent to reach decisions, but that is common to federal Indian law. What makes their task even more “gut-wrenching”<sup>1</sup> are the *people* at stake, children and parents involved in contested adoptions that “cut at the heart of the most sacred, essential institutions of our society—the family.”<sup>2</sup> Nevertheless, courts regularly upheave families in messy adoptions. ICWA cases are

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1. *In re Adoption of B.B.*, 2017 UT 59, ¶ 1, 417 P.3d 1, 4.  
2. *Id.* ¶ 91, 417 P.3d at 32 (Lee, J., dissenting).

truly unique because of the added weight of preventing the disruption of a child's connection to another institution—her tribe. This relationship, which has “no parallel in other ethnic cultures found in the United States[,]” is equally sacred.<sup>3</sup> It is also far rarer. Despite the guidance of ICWA (a statute that in part requires states to account for tribal rights in child placements) courts struggle to understand, respect, and accommodate child-tribal relationships.

Artists and poets are better suited to explore the boundaries and meaning of human relationships, but legislatures and courts must necessarily delineate them. ICWA defines *parent* as “any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established.”<sup>4</sup> Congressional silence has left courts the responsibility of determining what qualifies as *acknowledging* or *establishing* paternity for unwed fathers. In response, state courts have not adopted one standard but three. Most expect unwed fathers to fulfill the state laws regarding *acknowledging* or *establishing* paternity to qualify as a *parent* under ICWA. Others use state law as a guideline by which to judge a father's efforts but adopt a standard that allows fathers to imperfectly comply.

The third standard for establishing paternity, a federal reasonableness standard, was recently announced by the Utah Supreme Court on August 31, 2017. *In re Adoption of B.B.* concerned the contested adoption of the child (B.B.) of two unmarried, enrolled members of the Cheyenne River Sioux Tribe.<sup>5</sup> Prior to the child's birth, Birth Father supported Birth Mother on the reservation in South Dakota, but once she moved to Utah in the summer of 2014 she ceased contact with him.<sup>6</sup> Upon B.B.'s birth in August, Birth Mother relinquished her parental rights and gave consent to adoption.<sup>7</sup> Additionally, on official documents she misrepresented that her brother-in-law was the biological father and that he was

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3. *In re Adoption of Halloway*, 732 P.2d 962, 969 (Utah 1986).

4. 25 U.S.C. § 1903(9) (2012).

5. *Adoption of B.B.*, 2017 UT 59, ¶ 4, 417 P.3d at 5.

6. *Id.* ¶ 5, 417 P.3d at 5.

7. *Id.* ¶ 6, 417 P.3d at 5.

not a member of a tribe.<sup>8</sup> The brother-in-law relinquished his purported parental rights and consented to the adoption without Birth Father's awareness the child was even born.<sup>9</sup>

Birth Mother proceeded with the adoption, but once she returned to South Dakota she informed Birth Father of her misrepresentation.<sup>10</sup> After contacting the tribe, adoption agency, and state, Birth Father motioned to intervene to establish paternity on December 31, 2014.<sup>11</sup> After a series of motions from the tribe, birth parents, and adoptive parents, the district court denied Birth Father's motion to intervene because it found he was not a *parent* under ICWA for failing to file his court affidavit, file notice of paternity proceedings, and offer to pay for Birth Mother's pregnancy expenses before Birth Mother executed her consent for adoption.<sup>12</sup> His untimeliness under state law disqualified him from receiving the additional parental protections of ICWA.<sup>13</sup> Birth Father then appealed to the Utah Supreme Court.

The Utah Supreme Court found that Birth Father did acknowledge paternity under ICWA and therefore was a *parent*.<sup>14</sup> However, the majority used a different standard than the district court.<sup>15</sup> Rather than requiring Birth Father to fulfill state law, the Utah Supreme Court held his actions needed to pass a federal reasonableness standard.<sup>16</sup> Under this new standard, Birth Father's untimeliness was not dispositive when compared with the evidence of his completion of all tasks required by state law for paternity actions, his residence with Birth Mother during the majority of her pregnancy, his "significant steps to care for his unborn child, including financial support during Birth Mother's pregnancy,"<sup>17</sup> his intentions to live with Birth Mother in Utah, and his active involvement in the adoption proceedings.<sup>18</sup>

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8. *Id.*

9. *Id.*

10. *Id.* ¶ 8, 417 P.3d at 6.

11. *Id.* ¶ 9, 417 P.3d at 6.

12. UTAH CODE ANN. § 78B-6-121(3) (West 2017).

13. *Adoption of B.B.*, 2017 UT 59, ¶ 12, 417 P.3d at 7.

14. *Id.* ¶ 49, 417 P.3d at 18.

15. *Id.* ¶ 51, 417 P.3d at 19.

16. *Id.* ¶ 71, 417 P.3d at 24–25.

17. *Id.* ¶ 82, 417 P.3d at 29.

18. *Id.* ¶ 74, 417 P.3d at 27.

In contrast, the dissent would have continued to use the state law standard because the dissenting justices construed *acknowledge* and *establish* as legal terms of art that signal the use of the state law standard.<sup>19</sup> Under this reading, Birth Father's incompliance with state law for *acknowledging* paternity disqualified him as a *parent* under ICWA.<sup>20</sup>

*In re Adoption of B.B.* raises critical questions about Congress's use of the words *acknowledge* and *establish*. Do the terms signify the intent for courts to use existing state laws for determining paternity or do they create a separate federal standard? The answer has significant consequences for litigants: under a federal standard, this biological father was granted the opportunity to intervene, which potentially prevents the adoption of a child he wishes to keep. More broadly, the answer will demarcate the boundaries of federal, tribal, and state power.

The couple whose opportunity to adopt B.B. was curtailed by *In re Adoption of B.B.* filed a petition for a writ of certiorari in the United States Supreme Court on December 29, 2017, but the Court denied it on March 26, 2018.<sup>21</sup> The highest court thus saved these lingering questions for another day.

In the meantime, I answer these questions. I argue that under current U.S. Supreme Court precedent, courts should be applying a state law standard for *acknowledging* and *establishing* paternity under ICWA. However, a state law standard does not sufficiently advance the purpose of the statute, and it improperly balances the rights of Indian children, parents, tribes, and the state. Thus, Congress should amend ICWA to permit unwed fathers to establish paternity by either (1) fulfilling new federal requirements enumerated in the amendment or (2) fulfilling the requirements of their tribal law or custom.

In Part II, I provide the historical background of ICWA to demonstrate why state institutions are a threat to the welfare of Indian children and tribes. Part III contains the description of the three different standards and the rationales for applying each. In Part IV, I conclude that given the U.S. Supreme Court precedent of using state law for undefined family law terms, the doctrine of the

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19. *Id.* ¶ 170, 417 P.3d at 49–50 (Lee, J., dissenting).

20. *Id.* ¶ 202, 417 P.3d at 57.

21. *R.K.B. v. E.T.*, 417 P.3d 1 (Utah 2017), *cert. denied*, 138 S. Ct. 1326 (2018) (mem.).

separation of powers, and key distinctions from a Supreme Court case that would suggest a federal standard, courts must currently apply the state law standard for *acknowledge* and *establish*. Additionally, I present principles that Congress should include in an amendment that would better fulfill its purposes in enacting ICWA and respond to current amendment proposals.

## II. HISTORICAL BACKGROUND

Following centuries of federal policy aimed at assimilating Native Americans into mainstream American society, Congress found “that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.”<sup>22</sup>

State courts were complicit, if not blatantly on the frontlines, in the cultural war against Indian tribes.<sup>23</sup> In response, Congress set forth “minimum Federal standards”<sup>24</sup> to protect Indian children, parents, and tribes from “deliberate, collaborative abuse of the child welfare system” such as when state institutions used “vague allegations of poverty and neglect” to excuse their removal of Indian children.<sup>25</sup> ICWA’s procedural standards create space for tribes to exercise their authority to determine what is in the best interests of their members’ children and the survival of the tribe by giving tribal courts (1) exclusive jurisdiction when the child is domiciled on the reservation and (2) concurrent jurisdiction with the states when the child is domiciled off the reservation.<sup>26</sup> Parties seeking “foster care placement of, or involuntary termination of parental rights to, an Indian child must establish by stringent

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22. 25 U.S.C. § 1901(4) (2012).

23. *See id.* § 1901(5) (“[T]he States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”).

24. *Id.* § 1902.

25. Brief of Amici Curiae National Congress of American Indians et al. at 1, Nat’l Council for Adoption v. Jewell, 156 F. Supp. 3d 727 (E.D. Va. 2015) (No. 1:15cv00675) (citations omitted).

26. 25 U.S.C. § 1911(a)–(b).

standards of proof that efforts have been made to prevent the breakup of the Indian family” thus protecting against the arbitrary use of state power.<sup>27</sup> Substantively, ICWA also curtails the power of states by requiring courts to follow placement preferences in adoptive, foster care, and preadoptive placements. The child’s extended family and tribe are favored first, followed by another Indian tribe, and finally non-Indians.<sup>28</sup>

The federal government has a long history of constraining state power over tribes.<sup>29</sup> What is unusual about ICWA is the federal government’s reach into domestic relations, an area usually “belong[ing] to the laws of the states, and not to the laws of the United States.”<sup>30</sup> The principle permitting each exercise of federal power against the states or in favor of the tribe (or as is often the case, in favor of the states and against the tribes<sup>31</sup>) is the trust relationship between the federal government and tribes.<sup>32</sup> Furthermore, Congress has plenary power over tribes that it uses to both protect and abrogate tribal sovereignty. In this instance, Congress “assumed the responsibility for the protection and preservation of . . . [tribal] resources[,]” of which children are particularly “vital to the continued existence and integrity of Indian tribes.”<sup>33</sup>

Many of ICWA’s additional protections are available only if a party can meet the definition of *parent* in § 1903. The law provides for court-appointed counsel if there is a finding of indigence, a guarantee that the proceedings will be translated into a language that the parent understands, the option to withdraw consent for foster placements under state law, withdrawal of consent in voluntary proceedings for termination of parental rights, objections in transferring the case from state to tribal jurisdiction, the opportunity to collaterally attack the termination of rights upon

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27. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 57 (1989) (citations omitted).

28. 25 U.S.C. § 1915.

29. *See, e.g., McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164 (1973); *Williams v. Lee*, 358 U.S. 217 (1959); *Worcester v. Georgia*, 31 U.S. (1 Pet.) 515 (1832).

30. *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890).

31. *See, e.g., Nevada v. Hicks*, 533 U.S. 353 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Montana v. United States*, 450 U.S. 544 (1981).

32. *See* 25 U.S.C. § 1901(2).

33. *Id.* § 1901(2)–(3).

consent being obtained through duress or fraud, and the ability to petition if proceedings violate certain ICWA provisions.<sup>34</sup>

Even more significantly, if a father cannot establish paternity, ICWA may not be applied to the proceedings at all if the disqualified father's tribal membership is the only evidence that the child is an *Indian child*.<sup>35</sup> All the protections against the abuse of state law that ICWA was meant to provide would be unavailable to the child, the father, and the tribe. Litigants have compelling incentives to argue that a father did or did not establish paternity. The recent litigation crescendo over the standard used to *acknowledge* or *establish* paternity shows parties' increased recognition of the standard's importance and adds urgency to finding the right answer.<sup>36</sup>

The federal courts' and agencies' interpretations of ICWA are central to its history. The U.S. Supreme Court provided foundational principles for analyzing ICWA's definitions in *Mississippi Band of Choctaw Indians v. Holyfield*. Twenty-four years later, Justice Sonia Sotomayor dissented in *Adoptive Couple v. Baby Girl* and opined on the requirements for acknowledging and establishing paternity. The federal executive branch addressed the definition in the Bureau of Indian Affairs 2016 ICWA Guidelines. Discussion of authority follows.

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34. *Id.* §§ 1911–1914.

35. Brief for the Inter Tribal Council of Arizona et al. as Amici Curiae in Support of Respondents Birth Father and Cherokee Nation at 20–21, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399), 2013 WL 1308813 (“[I]f an unwed father who has not technically preserved his parental rights pursuant to state law would not qualify as a ‘parent’ under ICWA, an otherwise involuntary proceeding under 25 U.S.C. § 1912 would be transformed into a voluntary proceeding under 25 U.S.C. § 1913 merely by virtue of the mother’s voluntary relinquishment of her parental rights to the Indian child. In such circumstances, ICWA’s requirements for involuntary proceedings, including notice to the child’s tribe, would arguably not apply. This result—the termination of parental rights to an Indian child without notice to the child’s tribe, and over the objection of the child’s biological Indian parent—is clearly not what Congress intended in crafting ICWA’s provisions.” (citation omitted)).

36. Of the nine cases related to the definition of acknowledging and establishing paternity in appellate courts, four have been in the past ten years. See *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013); *In re Adoption of B.B.*, 2017 UT 59, 417 P.3d 1; *Bruce L. v. W.E.*, 247 P.3d 966 (Alaska 2011); *Jared P. v. Glade T.*, 209 P.3d 157 (Ariz. Ct. App. 2009).



### A. Mississippi Band of Choctaw Indians v. Holyfield

*Mississippi Band of Choctaw Indians v. Holyfield* was the first U.S. Supreme Court case to address ICWA, twelve years after it was passed.<sup>37</sup> Its principles provide the foundation for the analysis in future ICWA cases. The legal question was if the Court should apply a state or federal definition of *domicile* to determine whether the state of Mississippi could exercise jurisdiction over the proposed adoption.<sup>38</sup>

The controversy arose because two enrolled members of the Mississippi Band of Choctaw Indians traveled 200 miles away from their homes on the reservation for the birth of their twins.<sup>39</sup> The adoption of the twins was processed in the local chancery court and the children were given to a non-Indian couple.<sup>40</sup> The tribe under ICWA, however, has exclusive custody proceedings over children “who resid[e] or [are] domiciled within the reservation.”<sup>41</sup> The tribe motioned to vacate the adoption decree but was overruled.<sup>42</sup> Eventually the Mississippi Supreme Court upheld the chancery court’s findings that the twins were not “domiciled” on the reservation according to Mississippi state law because (1) they had never been physically present there, and (2) they were “‘voluntarily surrendered’ by their parents, who went to some efforts to see that they were born outside the reservation and promptly arranged for their adoption.”<sup>43</sup> The Mississippi Supreme Court went to great lengths to distinguish the case from state common law, which dictates that the domicile of children follows their parents.<sup>44</sup> The result of the holding that the twins were not “domiciled” on the

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37. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

38. *Id.* at 40–41.

39. *Id.* at 38–39.

40. *Id.* at 37.

41. 25 U.S.C. § 1911(a) (2012).

42. *Holyfield*, 490 U.S. at 38–39.

43. *Id.* at 38.

44. *In re Guardianship of Watson*, 317 So. 2d 30, 32 (Miss. 1975) (“The law is unchallenged that the residence of a minor is that of his parents and remains so during the period of minority . . . .”); *Stubbs v. Stubbs*, 211 So. 2d 821, 824 (Miss. 1968) (“Quite clearly the domicile established by the mother and father of the decedent in Natchez, Mississippi, in 1955 became the domicile of the minor child.”); *Boyle v. Griffin*, 36 So. 141, 142 (Miss. 1904) (“His domicile being in Memphis, that also was the domicile of his children in the view of the law.”).

reservation is that parents of Indian children could thwart ICWA's guarantee that tribes can exercise jurisdiction over their most vital resource.<sup>45</sup>

The U.S. Supreme Court overturned the Mississippi Supreme Court's decision concerning the source for the definition of *domicile*. The U.S. Supreme Court held that a uniform federal definition applies because the use of individual state law "cannot be what Congress had in mind when it used the term [*domicile*]." <sup>46</sup> Although the U.S. Supreme Court created a uniform federal definition, it still drew upon "well-settled" state law to formulate Congress's intent for "a term it did not define."<sup>47</sup> It borrowed "established common-law principles of domicile to the extent that they are not inconsistent with the objectives of the congressional scheme."<sup>48</sup>

The holding of the case, a straightforward rule that Indian children take the domicile of their mother, is less significant than the framework the U.S. Supreme Court developed for examining the use of federal and state law within ICWA.<sup>49</sup> First, courts look to Congress's purpose in protecting "the rights of Indian families and Indian communities vis-à-vis state authorities."<sup>50</sup> Second, courts determine if Congress intended uniform federal law to apply to the question.<sup>51</sup> Third, courts must balance the rights of the child, biological parents, adoptive parents, and tribe.<sup>52</sup> *Holyfield's* question of domicile pitted the rights of Indian families against the rights of tribes. In this instance, the rights of the Indian tribe superseded those of the family.

The dissent by Justice Stevens, Chief Justice Rehnquist, and Justice Kennedy acknowledged the importance of looking to Congress's purposes and applying uniform federal law.<sup>53</sup> However, the Justices formulated a different balance of tribal and familial rights. From the Justices' view, the "best interests of the child" and the

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45. 25 U.S.C. § 1901(3).

46. *Holyfield*, 490 U.S. at 47.

47. *Id.*

48. *Id.* at 47–48.

49. *Id.* at 53.

50. *Id.* at 45.

51. *Id.* 45–46.

52. *Id.* at 55–58 (Stevens, J., dissenting).

53. *Id.*

“stability and security of Indian tribes and families” are not represented when “the parents’ deliberate choice of jurisdiction” is defeated.<sup>54</sup> The Justices reasoned that because Indian parents whose child is domiciled on the reservation can veto the transfer of an action from state court to tribal court, a similar mechanism should be available to parents of a child not domiciled on the reservation to select “the forum . . . that most reflects the parents’ familial standards.”<sup>55</sup>

### B. Adoptive Couple v. Baby Girl

After *Holyfield*, the Supreme Court did not hear another ICWA case until 2013. The convoluted facts of *Adoptive Couple v. Baby Girl* raised many legal questions, including the possibility that the birth father was not a *parent* per § 1903(9).<sup>56</sup> If he did not meet the definition of *parent*, Adoptive Couple argued ICWA would be irrelevant to the case; the Court could not apply protections of the high standard of harm and remedial efforts to his case.<sup>57</sup> However, this critical question about the definition of *parent* went unanswered. Because the Court did not need to decide if he was a parent, it did not. For the sake of argument, it was assumed the father qualified.<sup>58</sup>

Justice Sotomayor, joined by Justices Kagan, Ginsburg, and Scalia, issued a dissent that briefly addressed the question anyway.<sup>59</sup> Justice Sotomayor cited *Holyfield* to explain, “Congress intended the critical terms of the statute to have uniform federal decisions.”<sup>60</sup> Later she reasoned, “[I]t is incongruous to suppose that Congress intended a patchwork of federal and state law to apply in termination of parental rights proceedings.”<sup>61</sup> Even though the position of the five majority justices regarding the *parent* question is unknown, the presence of Justice Scalia in this dissent

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54. *Id.* at 60.

55. *Id.* at 61.

56. *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013).

57. *Id.* at 639–43.

58. *Id.* at 646–47.

59. *Id.* at 670–73.

60. *Id.* at 671 (citing *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44–45 (1989)).

61. *Id.* at 681.

indicates that the federal standard could be upheld by conservative, textualist judges as well.<sup>62</sup>

### C. BIA Guidelines

Though most of the substantive debate about acknowledging or establishing paternity has occurred in courts, the Bureau of Indian Affairs (BIA) has addressed the question through the agency's rules and Guidelines for Implementing the Indian Child Welfare Act.<sup>63</sup> The result is a slightly inaccurate restatement of state case law that does not refine the answer.

The 1979 Guidelines did not provide any suggestions to state courts for interpreting the definition of *parent*.<sup>64</sup> The 2015 Guidelines added the following to the definition, "To qualify as a parent, an unwed father need only take reasonable steps to establish or acknowledge paternity. Such steps may include acknowledging paternity in the action at issue or establishing paternity through DNA testing."<sup>65</sup> The invocation of reasonableness reflects the recent trend in case law toward less-rigid requirements. But significantly, these guidelines do not have the force of law nor do they provide the answer to the fundamental question: are these "reasonable steps" a matter of state or federal law?

But one year later, the BIA backed away from adopting the reasonableness standard in rules, which, unlike the guidelines, bind agencies and courts. In anticipation of the 2016 rules, the agency presented the results of the notice and comment period:

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62. Because Justice Sotomayor's writing on this question is dicta, my analysis is speculative. Justice Scalia may not have fully supported the argument about the question of establishing paternity and may have agreed to join the dissent based upon the first question. Nevertheless, his choice to write separately and to join Justice Sotomayor suggests he agreed with her key arguments, which may include her view of establishing paternity.

63. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23).

64. Guidelines for State Courts; Indian Child Welfare Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979).

65. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, 10,151 (Feb. 25, 2015).

These commenters recommended language requiring an unwed father to “take reasonable steps to establish or acknowledge paternity” and recommended listing examples of such steps to include acknowledging paternity in the action at issue and establishing paternity through DNA testing. Another commenter requested clarification on when the father must acknowledge or establish paternity, because timing impacts due process and permanency for the child.<sup>66</sup>

However, despite the request for clarity by these commenters, the BIA declined to address the manner and timing of acknowledging or establishing paternity:

The final rule mirrors the statutory definition and does not provide a Federal standard for acknowledgment or establishment of paternity. The Supreme Court and subsequent case law has already articulated a constitutional standard regarding the rights of unwed fathers . . . . Many State courts have held that, for ICWA purposes, an unwed father must make reasonable efforts to establish paternity, but need not strictly comply with State laws. At this time, the Department does not see a need to establish an ICWA-specific Federal definition for this term.<sup>67</sup>

Two contextual elements suggest why the BIA did not elucidate the definition after recognizing a split in state courts. First, the relatively few state cases about establishing paternity do not provide a consensus,<sup>68</sup> so the BIA may delay until one develops. Second, the agency was aware of Justice Sotomayor’s 2013 dissent in *Adoptive Couple v. Baby Girl* when it issued the guidelines. The U.S. Supreme Court narrowly avoided the question of establishing paternity in *Adoptive Couple*, but by addressing it in her dissent, Justice Sotomayor effectively invited new litigation so that the question can be resolved. Rather than promulgating something that may soon be overturned by the Supreme Court, the BIA may leave the debate to state courts.

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66. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,795–96 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23).

67. *Id.* at 38,796 (citations omitted).

68. See e.g., *Jared P. v. Glade T.*, 209 P.3d 157 (Ariz. Ct. App. 2009) (applying state law but requiring imperfect compliance); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 935 (N.J. 1988) (applying state law exactly).

Of these historical authorities, *Holyfield* is the most important source of law in answering the question of what it means to establish paternity under ICWA. Not only is it the solitary mandatory federal authority but it also provides the key rationales for using federal law in an ICWA context and supplies the most detail about the interplay of statutory purpose with ICWA's provisions.

### III. THREE STANDARDS FOR ESTABLISHING PATERNITY

State courts have three responses to the question of what Congress intended by using, but not defining, *establish* and *acknowledge*. The first is that courts interpret *establish* and *acknowledge* as terms of art that signal the application of state law. Courts reason that because there is no federal paternity law and because ICWA is implemented in state institutions, fathers must establish paternity by meeting the state standard. The second response is that ICWA must invoke a federal standard because its primary purpose was to protect Indian families against the unjust application of state law. Because there is no specific federal paternity law, the Utah Supreme Court held that the federal law is a reasonableness standard. The displacing of state law with federal law has precedent in the U.S. Supreme Court case *Mississippi Band of Choctaw Indians v. Holyfield*.<sup>69</sup>

The *In re Adoption of B.B.* court addressed each option. The dissent argued for a state law standard and the majority for a federal law standard. Notably, each opinion used the cases *Jared P. v. Glade T.* and *Bruce L. v. W.E.*, from Arizona and Alaska courts respectively, to support its conclusion.<sup>70</sup> However, *Jared P.* and *Bruce L.* actually present a third response to the question of Congress's intent: imperfectly fulfilled state law. These courts looked to state law for the requirements to establish paternity but did not require Indian fathers to comply perfectly to qualify as a *parent* under ICWA. Courts that use the imperfectly fulfilled state law standard attempt to combine the best rationales from state law and federal law standards.

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69. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

70. *Jared P. v. Glade T.*, 209 P.3d 157 (Ariz. Ct. App. 2009); *Bruce L. v. W.E.*, 247 P.3d 966 (Alaska 2011).

*A. State Law Standard*

State law is the most common standard courts use to determine if a father acknowledged or established paternity under ICWA. State courts of last resort in Oklahoma<sup>71</sup> and New Jersey<sup>72</sup> each applied state law, with appellate courts in California<sup>73</sup> and Texas<sup>74</sup> doing so as well. Each state could have a different standard for acknowledging and establishing paternity if its statutes uphold minimum constitutional protections.<sup>75</sup> Additionally, the New Jersey Supreme Court emphasized that state law approaches must be “permissible variations on the methods of acknowledging and establishing paternity within the general contemplation of Congress when it passed ICWA.”<sup>76</sup>

While there are various state standards, there are also general trends. State legislatures have broadly produced three types of laws addressing paternity. First, circumstances are listed in which a man is presumed to be the child’s father.<sup>77</sup> One of those circumstances is

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71. *In re Adoption of Baby Boy D.*, 742 P.2d 1059, 1064 (Okla. 1985) (holding acknowledgement and establishment is accomplished through “procedures available through the tribal courts, consistent with tribal customs, or through procedures established by state law”), *overruled by In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004) (overruling *In re Adoption of Baby Boy D.* for using the “existing Indian family” doctrine but not in the application of state law).

72. *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 935 (N.J. 1988) (“[W]e infer a legislative intent to have the acknowledgment or establishment of paternity determined by state law.”).

73. *In re Daniel M.*, 1 Cal. Rptr. 3d 897, 900 (Cal. Ct. App. 2003) (“Moreover, because the ICWA does not provide a standard for the acknowledgment or establishment of paternity, courts have resolved the issue under state law.”).

74. *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 173 (Tex. App. 1995) (citing *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 935 (N.J. 1988)).

75. “[U]nwed fathers who grasp the opportunity to parent their biological children have *constitutionally* protected interests equal to married parents and unwed mothers. On the other hand, unwed fathers who have only a biological link to their children, and nothing more, are *not constitutionally* entitled to the procedural protections given to married fathers and mothers.” Brief of Family Law Professors as Amici Curiae in Support of Respondents Birth Father and Cherokee Nation at 8–9, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399). See *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972).

76. *Adoption of a Child of Indian Heritage*, 543 A.2d at 935.

77. For example, under the Utah statute, paternity is presumed when the putative father is married to the mother when the child is born or if the child was born within 300 days of the termination of their marriage. UTAH CODE ANN. § 78B-15-204 (West 2017).

when the father voluntarily acknowledges his paternity.<sup>78</sup> The second type of law therefore identifies these requirements as acknowledgement. *Acknowledgement* “generally refers to a writing by a father (with or without a requirement of consent by the mother), where the writing itself has the legal effect of sustaining a father’s parental rights to some degree.”<sup>79</sup> An example of this writing comes from the Uniform Parentage Act, promulgated by the Uniform Laws Commissioners in 1975.<sup>80</sup> A father acknowledges paternity by filing the writing containing attested signatures of the mother and father with the state agency maintaining birth records.<sup>81</sup> An acknowledged father is guaranteed the right to “receive notice of court proceedings regarding the child,” the opportunity to “seek visitation with the child, and usually will be required to provide financial support to the child.”<sup>82</sup> The third set of laws provides an alternative to acknowledging paternity with “the concept of an establishment of paternity, which is initiated by a court filing and culminates in the issuance of a judicial order (sometimes contested but not necessarily) establishing the father’s parental rights and obligations.”<sup>83</sup> Another frequent option for establishing paternity is genetic testing.<sup>84</sup>

In Utah, a father can acknowledge paternity with a declaration filed with the Office of Vital Records accompanied by a “written and verbal notice of the alternatives to, the legal consequences of, and the rights and responsibilities that arise from signing the declaration.”<sup>85</sup> The declaration of paternity is not valid if it is filed or signed after consent or relinquishment to adoption has been given.<sup>86</sup> Establishing paternity is possible through a judicial or

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78. See, e.g., *id.* § 78B-15-204(1)(d); ARIZ. REV. STAT. ANN. § 25-814(A)(4) (2018); IDAHO CODE ANN. § 7-1106(1) (West 2018).

79. *In re Adoption of B.B.*, 2017 UT 59, ¶ 170, 417 P.3d 1, 49–50 (citations omitted).

80. UNIFORM PARENTAGE ACT §§ 302, 304 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2017).

81. *Id.*

82. U.S. DEP’T OF HEALTH & HUMAN SERV., CHILDREN’S BUREAU, THE RIGHTS OF UNMARRIED FATHERS (2014).

83. *Adoption of B.B.*, 2017 UT 59, ¶ 170, 417 P.3d at 49–50 (Lee, J., dissenting) (emphasis omitted).

84. See UNIFORM PARENTAGE ACT art. 5 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2017).

85. UTAH CODE ANN. § 78B-15-302(5) (West 2017).

86. *Id.* § 78B-15-302(8).



administrative finding.<sup>87</sup> The strictness of this timing would have caused Birth Father in *In re Adoption of B.B.* to fail to acknowledge paternity under state law.

The rationale for the application of state law is fourfold. First, there is a strong presumption that “[a]ny time Congress acts . . . it intends to respect the traditional boundaries between state and federal power. That presumption is at its zenith in the area of domestic relations given the traditional responsibility of the States in such matters.”<sup>88</sup> In using family law terms like *acknowledge* and *establish* it can be assumed that state law definitions would apply. This is demonstrated in *De Sylva v. Ballentine*, in which a copyright renewal rights case turned on the definition of *children*.<sup>89</sup> The court explained,

The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.<sup>90</sup>

The term *children* “requires reference to the law of the State which created those legal relationships.”<sup>91</sup> The court did not apply state law without any qualifications though. It stated “[t]his does not mean that a State would be entitled to use the word ‘children’ in a way entirely strange to those familiar with its ordinary usage, but at least to the extent that there are permissible variations in the ordinary concept of ‘children’ we deem state law controlling.”<sup>92</sup> ICWA cases are squarely those of “domestic relations,” and the acts of *acknowledging* and *establishing* paternity effectively regulate what is a legally recognized familial relationship.

Justice Thomas Lee in *In re Adoption of B.B.* goes so far as to claim that “the protection of the traditional jurisdiction of state courts over adoption proceedings” was a “key countervailing purpose” of

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87. *Id.* § 78B-15-601(1).

88. Brief for Petitioners at 14–15, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399), 2013 WL 633597.

89. *De Sylva v. Ballentine*, 351 U.S. 570 (1956).

90. *Id.* at 580 (citation omitted).

91. *Id.*

92. *Id.* at 581.

ICWA.<sup>93</sup> Though there is no direct expression of this purpose in the text it could be inferred by comparing what the statute does and does not do: “ICWA does not create an independent federal adoption regime.”<sup>94</sup> Other evidence of this preservation of states’ roles is in the committee report: “the Committee does not feel that it is necessary or desirable to oust the states of their traditional jurisdiction over Indian children falling within their geographic limits.”<sup>95</sup>

Second, the question about the standard for establishing paternity raises issues of separation of powers. Congress is the policymaker and courts interpret the law. To have state courts determining what actions are sufficient to acknowledge and establish paternity gives them too great a policymaking power.<sup>96</sup> As evident from ICWA and other family law cases, paternity questions involve a careful balancing of state, parent, child, and societal interests, and a legislature has the best tools to research the optimal standard. Justice Lee emphasizes that this mingling of powers is particularly unlikely because the federal Congress would not delegate its policymaking power to a “judicial branch of another sovereign—fifty sovereigns, really—in a field traditionally left to that sovereign’s sole authority.”<sup>97</sup>

Third, Congress did not intend *acknowledge* and *establish* to be applied uniformly. *Holyfield* recognized that state-law definitions of statutory terms can be applied when “uniformity clearly was not intended.”<sup>98</sup> One such example is the statute at issue in the copyright case, *De Sylva*, which explicitly draws upon family law terms.<sup>99</sup> Another is the statute at issue in *Reconstruction Financial Corp. v. Beaver County*, a case in which Congress allowed “real property” of an agency to “be subject to State, Territorial, county, municipal, or local taxation.”<sup>100</sup> The Supreme Court determined that the state law definition of “real property” should apply, not the

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93. *In re Adoption of B.B.*, 2017 UT 59, ¶ 159, 417 P.3d 1, 47 (Lee, J., dissenting).

94. *Id.* ¶ 160, 417 P.3d at 48.

95. H.R. REP. NO. 95-1386, at 19 (1978), as reprinted in 1978 U.S.C.A.N. 7530, 7541.

96. *Adoption of B.B.*, 2017 UT 59, ¶ 174, 417 P.3d at 51 (Lee, J., dissenting).

97. *Id.*

98. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44 (1989).

99. See *supra* text accompanying notes 89–92.

100. *Reconstruction Fin. Corp. v. Beaver County*, 328 U.S. 204, 206 (1946) (citations omitted).

federal definition. This is because of the congressional purpose and state traditions:

Concepts of real property are deeply rooted in state traditions, customs, habits, and laws . . . . To permit the States to tax, and yet to require them to alter their long-standing practice of assessments and collections, would create the kind of confusion and resultant hampering of local tax machinery which we are certain Congress did not intend.<sup>101</sup>

By using state law paternity terms that are “deeply rooted in state traditions, customs, habits and laws,” Congress demonstrated it intended no uniformity in the definitions of *acknowledge* and *establish*. Furthermore, to require the state to apply two different standards for establishing paternity, one for the parents of non-Indian children and one for the parents of Indian children, may “create[] confusion and result[] [in the] hampering of local” family law adjudications.

Fourth, even if uniformity is the congressional goal, a federal reasonableness standard will not create uniformity across the various state courts. State law, at least, provides uniformity within the state. The processes for acknowledging and establishing paternity are recorded in statutes and upheld consistently across cases. In contrast, reasonableness standards invite subjective interpretations and particularly fact-specific analyses. Though it is extreme to suggest that such a standard will “guarantee chaos and unpredictability,” it will likely create wide variation of what is reasonable within and across jurisdictions.<sup>102</sup> Having internal consistency within each state is better for an Indian father. He has notice through the statute of what is required for him to claim his rights. He needs to do no case law research to determine if his actions are reasonable. Additionally, state paternity statutes generally describe the same basic processes. *Acknowledging* is a written statement by the father submitted to a specified government office, and *establishing* is a judicial order. Variations from state to state are real, but the actual differences are small. Thus, fathers can anticipate what will be required of them in each state.

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101. *Id.* at 210.

102. *Adoption of B.B.*, 2017 UT 59, ¶ 200, 417 P.3d at 56 (Lee, J., dissenting).

*B. Federal Law Standard*

The federal standard is most clearly articulated and was formally adopted by the Utah Supreme Court in *In re Adoption of B.B.* Neither ICWA nor other federal laws define precise procedures and timing for *acknowledging* and *establishing* paternity, so the majority created a uniform reasonableness standard for the terms.<sup>103</sup> The Utah Supreme Court uses case-specific examples of what is reasonable but does little else to suggest what may qualify. Furthermore, the court does not indicate if Birth Father's actions were sufficient because of their cumulative effect or if any were independently adequate.

Writing for the majority, Justice Constandinos Himonas gave weight to Birth Father's following actions: (1) residing with the birth mother before conception, (2) living with the birth mother for six months after conception, (3) payment of the birth mother's bills, (4) conveying expectations that they would live together again even after their contact ended, (5) hastily informing the tribe of the fraud, (6) obtaining legal counsel, and (7) filing many documents asserting paternity and intervention in the case.<sup>104</sup> Under the plain meaning of the terms *acknowledge* and *establish*, Birth Father had shown "recognition" of the child and "attempts to be responsible" for the child.<sup>105</sup> Justice Himonas also emphasized that Birth Father had "accomplished all of the tasks required by Utah's [paternity] statute" if it were not for the timing issues.<sup>106</sup> This suggests that state law requirements hold weight under a reasonableness standard not simply because they are state law but because they are concrete examples of effort to recognize and take responsibility for the child.<sup>107</sup>

Although the Utah Supreme Court majority was the first to articulate its reasoning for looking to federal law rather than state law as the uniform federal reasonableness standard, the South Carolina Supreme Court has also looked to the plain meaning of ICWA terms to guide paternity decisions. Its analysis is even more

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103. *Id.* ¶ 71, 417 P.3d at 24–26 (majority opinion).

104. *Id.* ¶ 74, 417 P.3d at 27.

105. *Id.* ¶ 52, 417 P.3d at 19 (citations omitted).

106. *Id.* ¶ 74, 417 P.3d at 27 (citations omitted) (alteration in original).

107. Additionally, state law requirements are relevant because they would clarify parental rights for non-ICWA contexts that would be solely governed by state law.

sparse and indeterminate than the Utah Supreme Court's, but it is still instructive. The South Carolina court determined that ICWA's "plain terms" allowed a father to "acknowledge[] his paternity through the pursuit of court proceedings as soon as he realized [his child] had been placed up for adoption and establish[] his paternity through DNA testing" even though these actions were not conducted in the time and manner required by state law.<sup>108</sup> Here again state law and court proceedings provide specific instances for the father to show his responsibility for the child.

In contrast, merely requesting counsel and writing to the court in objection to the child's adoption may be insufficient to acknowledge paternity.<sup>109</sup> Speculation may not be enough either.<sup>110</sup>

Thus, if other courts apply the federal reasonableness standard, they would most likely consider the broad categories of (1) interactions with birth mother, (2) objective evidence of plans for future interactions with the child, (3) the filing of traditional state paternity paperwork, and (4) voluntary courtroom actions. These would probably operate as a factor test, with the filing of traditional state paperwork as the factor with the greatest weight. Meeting state law requirements might always be sufficient, but unnecessary because of all the other reasonable ways that fathers might choose to recognize their children and show responsibility for them. A father's recognition, acceptance, and interest in developing a relationship with his child outside state legal mechanisms has significant weight in real relationships, and this standard allows his efforts to count in the courtroom too.<sup>111</sup>

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108. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 560 (S.C. 2012), *rev'd*, 570 U.S. 637 (2013).

109. *In re Adoption of T.R.M.*, 525 N.E.2d 298, 313–14 (Ind. 1988).

110. *In re Appeal in Maricopa Cty. Juvenile Action No. A-25525*, 667 P.2d 228, 233 (Ariz. Ct. App. 1983).

111. Justice Himonas's hypothetical demonstrates this:

The [state law] standard would lead to absurd situations where an unwed father who clearly has acknowledged or established paternity under ICWA would not qualify under Utah law. Take, for example, a situation where a biological mother abandons a child with the unmarried biological father. If the father acted as the sole caretaker for his child, that would surely be a clear-cut case of acknowledgement of paternity. But under Utah law, the father would not have acknowledged paternity if he did not have a written agreement that the mother had also signed. This would provide the father with fewer rights than a

There are five reasons showing that Congress intended a federal standard to apply to the terms *establish* and *acknowledge*. First, there is a “general assumption that ‘in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law.’”<sup>112</sup> In addition to case law describing this assumption,<sup>113</sup> the federalism division in the American legal system supports the concept: the federal government should not have to rely on states to carry out its enumerated powers. The presumption is stronger when the word in question is a “critical term.”<sup>114</sup> As *domicile* is critical in *Holyfield* because it is related to ICWA’s “key jurisdictional provision,”<sup>115</sup> so too *acknowledge* and *establish* are critical because they relate to key stakeholders. ICWA balances the interests of four parties: child, biological parents, adoptive parents, and tribe. In some instances, the terms are especially critical because the rights of the tribe are connected to the recognition of an Indian father as a parent.<sup>116</sup>

Second, ICWA was designed to combat the abuses arising from state law; to then rely upon state law to determine the rights of key stakeholders is illogical. Courts express distrust of state authorities,

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reasonability standard under ICWA. We believe a common-sense reading of ICWA prohibits [this] strict interpretation.

*Adoption of B.B.*, 2017 UT 59, ¶ 73, 417 P.3d at 26–27 (alterations in original) (citations omitted).

112. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989) (quoting *Dickerson v. New Banner Inst.*, 460 U.S. 103, 119 (1983); *NLRB v. Nat. Gas Util. Dist.*, 402 U.S. 600, 603 (1971); *Jerome v. United States*, 318 U.S. 101, 104 (1943)).

113. *See, e.g., Dickerson*, 460 U.S. at 119; *Nat. Gas Util. Dist.*, 402 U.S. at 603; *Jerome*, 318 U.S. at 104.

114. *Holyfield*, 490 U.S. at 44.

115. *Id.* at 45.

116. Brief for the Inter Tribal Council of Arizona et al. as Amici Curiae in Support of Respondents Birth Father and Cherokee Nation at 20, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399), 2013 WL 1308813 (“[If] an unwed father who has not technically preserved his parental rights pursuant to state law would not qualify as a ‘parent’ under ICWA, an otherwise involuntary proceeding under 25 U.S.C. § 1912 would be transformed into a voluntary proceeding under 25 U.S.C. § 1913 merely by virtue of the mother’s voluntary relinquishment of her parental rights to the Indian child. In such circumstances, ICWA’s requirements for involuntary proceedings, including notice to the child’s tribe, would arguably not apply. This result—the termination of parental rights to an Indian child without notice to the child’s tribe, and over the objection of the child’s biological Indian parent—is clearly not what Congress intended in crafting ICWA’s provisions.” (citation omitted)).

including state courts, in providing for “the rights of Indian families and Indian communities” when they cite the legislative history and purpose of the statute.<sup>117</sup> Justice Himonas in *In re Adoption of B.B.* captured this rationale vividly: “We are loath to pour state law back into ICWA when ICWA’s whole reason for being is to drain, what in Congress’s view, is an inequitable swamp—displacing state law on the matters on which ICWA speaks.”<sup>118</sup>

The existence of cases like *Holyfield* in 1987 show that even after the passage of ICWA in 1978 state courts used state law to undermine the rights of Indian tribes and parents. The Mississippi Supreme Court held, apart from its analysis of *domicile*, that the *Holyfield* adoption proceedings entirely “escape applicable federal law on Indian Child Welfare.”<sup>119</sup> This reasoning unashamedly ignored the other statutory grounds upon which tribal courts could intervene. Furthermore, by taking elaborate efforts to distinguish the domicile of the twins from state precedent, the state court majority revealed intentions to treat Indian families differently. The state court’s willingness to contradict “generally accepted doctrine [of] this country”<sup>120</sup> to avoid applying ICWA demonstrates the validity of Congress’s concern that state courts abuse Indian tribes and families.<sup>121</sup>

Third, a federal standard fosters uniformity, while a patchwork of state laws would not. Federal statutes are generally intended to

117. *Holyfield*, 490 U.S. at 44–45.

118. *In re Adoption of B.B.*, 2017 UT 59, ¶ 65, 417 P.3d 1, 23.

119. *In re B.B.*, 511 So. 2d 918, 921 (Miss. 1987), *rev’d sub nom.* Miss. Band of Choctaw Indians v. *Holyfield*, 490 U.S. 30 (1989).

120. *Holyfield*, 490 U.S. at 49.

121. Another example of the state courts taking efforts to avoid applying ICWA is the existing Indian family exception. State courts imposed an extra-textual requirement that exempts “application of the ICWA” in those cases where the Indian child’s family has not “maintained a significant social, cultural, or political relationship with [their] tribe.” . . . Where there is no Indian family to break up, either because it never existed or had already broken apart prior to the custody proceedings, courts reason that ICWA does not apply.

Shawn L. Murphy, *The Supreme Court’s Revitalization of the Dying “Existing Indian Family” Exception*, 46 MCGEORGE L. REV. 629, 636 (quoting Barbara Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 625 (2002)). Twelve states applied the exception, but now only six do (Alabama, Indiana, Missouri, Kentucky, Louisiana, and Tennessee). *Id.* A version of this doctrine was upheld by the Supreme Court in *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013).

have national applicability.<sup>122</sup> On the other hand, when courts find that Congress intended a state-law definition of a term, the statutes are often those where uniformity was clearly not intended.<sup>123</sup> Congress found the violation of Indian rights across the United States, and so the presumption for a nationally applicable solution is not rebutted. The essential element of the solution is knowing when to apply the heightened protections. If a father of an *Indian child* is entitled to heightened protection of his rights in Minnesota, why should he not have the same protections in Montana? The *Holyfield* court found that “a statute under which different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another, cannot be what Congress had in mind.”<sup>124</sup>

Furthermore, there is a presumption of uniformity when the application of state law would impair the federal program.<sup>125</sup> One example of the frustration of the federal program through the application of state law is given in *In re Adoption of B.B.* Utah does not allow a father to *acknowledge* paternity unless the mother gives her signature. “Thus, in cases where the birth mother declines to sign the declaration, the unmarried biological father is precluded from acknowledging paternity under ICWA . . .”<sup>126</sup> He must *establish* paternity, instead, under Utah’s notoriously strict laws. Requiring him to meet this very high standard to receive “any protection of his parental rights . . . ‘would to a large extent nullify the purpose of the ICWA was intended to accomplish.’”<sup>127</sup>

Fourth, “Congress can and does expressly state when it wants a state or tribal law definition to apply.”<sup>128</sup> The definitions of

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122. *Holyfield*, 490 U.S. at 43.

123. *Id.* at 44.

124. *Id.* at 46. *See also* Brief for Respondent Birth Father at 25–26, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399), 2013 WL 1191183. (“At the time that Congress enacted ICWA, state adoption-consent laws varied dramatically. Some States required the unwed father’s consent only if he had established paternity according to the jurisdiction’s own laws; others if he had established paternity under the laws of *any* jurisdiction; and still others required him both to acknowledge paternity and to legitimate the child. Others did not require his consent under any circumstances at all.” (citations omitted)).

125. *Id.* at 44.

126. *In re Adoption of B.B.*, 2017 UT 59, ¶ 67, 417 P.3d 1, 24.

127. *Id.*

128. *Id.* ¶ 60, 417 P.3d at 21 (citations omitted).



*extended family member*<sup>129</sup> and *Indian custodian*<sup>130</sup> expressly refer to state law or tribal law. The lack of such specificity in the definition of *parent* indicates that Congress “rejected the formulation embodied in the neighboring provision.”<sup>131</sup> This canon of interpretation harmonizes well with the presumptions that federal law will not depend upon state law and that uniformity is intended. If these presumptions are not reflective of Congress’s intention, then it has the tools (which it has used) to apply state law.<sup>132</sup>

Finally, the federal standard should be one of reasonableness because of

the canon of interpretation that [states] where a statute is silent as to the time or manner of a subject, [courts] presume a reasonability standard—an approach that is consistent with ICWA case law and has been applied by many states over many years and many different topics of law.<sup>133</sup>

### *C. Imperfectly Fulfilled State Law Standard*

The third standard, imperfectly fulfilled state law, is described in Arizona and Alaska court cases. The Alaska case was cited by Justice Himonas to provide precedent for imposing a federal reasonableness standard in *In re Adoption of B.B.*<sup>134</sup> The dissent correctly counters that neither the Arizona nor Alaska case explicitly establishes this federal standard;<sup>135</sup> rather, the courts write of state requirements imperfectly fulfilled. These cases support the opposing two standards and yet provide no definitive precedent, because each case hybridizes the reasonableness and state law approaches.

The Arizona Court of Appeals created the imperfectly fulfilled state law standard in *Jared P. v. Glade T.* The birth father successfully

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129. 25 U.S.C. § 1903(2) (2012).

130. *Id.* § 1903(6).

131. *Adoption of B.B.*, 2017 UT 59, ¶ 60, 417 P.3d at 21 (quoting *Craig v. Provo City*, 2016 UT 40, ¶ 38 n.9, 389 P.3d 423, 431 n.9).

132. 25 U.S.C. § 1903(6).

133. *Adoption of B.B.*, 2017 UT 59, ¶ 71 n.26, 417 P.3d at 25 n.26 (citing cases related to contract performance, permitting licenses, winding up corporations, record keeping requirements, among others).

134. *Id.* ¶ 72 n.28, 417 P.3d at 26 n.28.

135. *Id.* ¶ 166 n.33, 417 P.3d at 49 n.33 (Lee, J., dissenting).

acknowledged paternity for the purposes of ICWA by (1) challenging the adoption agency's petition seeking to terminate his parental rights, (2) attempting to be present for the child's birth, (3) filing a paternity action in another state, (4) amending his out-of-state action upon learning the adoptive parents' intentions to adopt, (5) writing letters to the juvenile court explaining he was the father, (6) enrolling in the tribe and submitting a copy of his membership to the court, and (7) complying with a court order for a DNA test that identified him as the child's biological father.<sup>136</sup> He "failed to comply formally" with the Arizona statutory requirements because he did not notify the mother that he had initiated a paternity action within thirty days after receiving notice of the adoption, but the court found that he still acknowledged paternity under ICWA.<sup>137</sup>

Citing *Jared P.*, the Alaska Supreme Court in *Bruce L. v. W.E.* found that for purposes of ICWA "an unwed father does not need to comply perfectly with state laws for establishing paternity, so long as he has made reasonable efforts to acknowledge paternity."<sup>138</sup> In this case the father failed to legitimate his son within the year required by state law because birth mother did not sign the forms; however, his filing of an "acknowledgement of paternity and an affidavit of paternity with the superior court[.]" "mov[ing] for custody and later . . . paternity testing[.]" and "fil[ing] a separate suit for custody" of the child were sufficient for ICWA parental recognition.<sup>139</sup> The Alaska Supreme Court applied a reasonableness standard, but the standard is not explicitly or implicitly federal. However, I interpret it as implementing the imperfectly fulfilled state law standard because its analysis is firmly anchored in Alaska state statutes and court procedures.

These courts are silent as to how much flexibility a putative father is accorded in meeting state requirements to satisfy ICWA. Because each father's failure to meet state requirements was related to timing issues, it is unlikely that courts would hold it reasonable to omit substantive actions. For example, failure to file all state forms or failure to make court motions are probably fatal lapses in

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136. *Jared P. v. Glade T.*, 209 P.3d 157, 162 (Ariz. Ct. App. 2009).

137. *Id.* at 162-63; see ARIZ. REV. STAT. ANN. § 8-106 (2017).

138. *Bruce L. v. W.E.*, 247 P.3d 966, 979 (Alaska 2011).

139. *Id.* (alterations in original).

fulfilling state requirements. Similarly, the courts gave no consideration to actions that fathers took outside the legal system. The interpersonal interactions and intentions of the fathers were apparently not a substitute for attempts to avail themselves of state legal remedies to paternity questions for purposes of ICWA.

Thus, this third standard is a hybrid of the state law and federal law standards. State law remains the root of the analysis and its requirements are given the most weight. And there is an argument that it is reasonable for courts to consider the father's near-perfect efforts to claim his child through the legal system as satisfying the plain meaning of *acknowledge* and *establish*. This standard allows courts to consider the proportionality of the father's failure to comply with the seriousness of its effects upon his and his child's lives.

Courts, legal professionals, and scholars have scarcely provided any rationale for the father's imperfect fulfillment of state law because (1) only two states have applied it and (2) these cases are incorrectly cited as supporting a federal standard.<sup>140</sup> Other than purpose-based arguments, the support for imperfectly fulfilled state law comes from the BIA Guidelines that suggest a liberal interpretation of the law.<sup>141</sup>

#### IV. RECOMMENDATION

Upon review of U.S. Supreme Court precedent, I conclude that the current standard for *acknowledge* and *establish* in § 1903(9) must be supplied by state law. Nevertheless, policy concerns, the purposes of ICWA, and the rationale of *Holyfield* should prompt Congress to amend ICWA to create a federal standard that allows for tribal variation in establishing paternity. In section A, I describe the reasons for my conclusion that state law currently applies, and in section B, I describe three principles that should guide Congress as it fixes flaws that remain from the application of the state law standard.

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140. See *Jared P.*, 209 P.3d at 157; *Bruce L.*, 247 P.3d at 966; Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,796 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23).

141. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,586 (Nov. 26, 1979) (ICWA is "to be liberally construed").

*A. Under Current Precedent, Courts Must Apply  
the State Law Standard*

Determining which standard's rationales are stronger was not an easy call. Because *Mississippi Band of Choctaw Indians v. Holyfield*, is the most apposite and controlling precedent for this ICWA definition issue, I determined that the key question is if the definitions of *acknowledge* and *establish* were analogous to the definition of *domicile*.<sup>142</sup> If they were sufficiently similar, then federal law should apply. If they were distinguishable, then state law should apply. They are distinguishable. Unlike federal domicile law, there is no federal paternity law that courts can apply in the alternative to state law. Without any existing federal law, it would be inappropriate for state courts to create federal law to fill the gaps in the statute because courts cannot adequately balance state, tribal, parental, and child interests.

Concerns for federalism do not animate this conclusion. Congress has plenary power over Indian tribes that extends to aspects of life that for non-Indians only state law would apply.<sup>143</sup> Certainly states "have an interest in child custody matters. But under the Constitution, [s]tates have no interest in matters affecting tribal membership or internal tribal relations."<sup>144</sup> Statutes relating to Indian affairs cannot simply be balanced on the traditional scale between state and federal interests; a third sovereign changes those calculations. In many jurisdictional questions, the states' authority over tribes and Indians is not inherent and comes from congressional actions that abrogate tribal sovereignty and divest tribal jurisdiction. Congressional regulation of the way states exercise authority over Indians (and their children) is nothing new. If Congress chooses to create federal paternity law relating to Indian children, it has the power to do so. However, none of ICWA's provisions show that Congress created federal paternity law, and without existing federal paternity law to draw upon, courts must apply state law.

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142. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

143. Examples include education, health care, alcohol regulation, property taxes, tobacco sales, and criminal codes.

144. Brief for the Cherokee Nation at 53, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399), 2013 WL 1225770.

The key to my conclusion is that the question of establishing paternity is distinguishable from the question in *Holyfield*. The application of federal law to an undefined term in *Holyfield* was dependent upon the existence of federal law to substitute for statutory silence. *Domicile*, *acknowledge*, and *establish* are each critical terms of ICWA because of their determinative influence on jurisdiction and the protections applicable to the case. However, *domicile* is “a concept widely used in . . . federal . . . courts for jurisdiction and conflict-of-laws purposes.”<sup>145</sup> The presence of *domicile* in federal law meant that the Supreme Court could interpret law rather than create it. And while the Court gave itself the option to “draw[] on general state-law principles” to make its determination, this really is no different than the traditional judicial process of looking to persuasive authority.<sup>146</sup> Furthermore, the Court had the federal case *Yarborough v. Yarborough* regarding the domicile of minors to guide its analysis.<sup>147</sup> *Acknowledge* and *establish* have no equivalent presence in federal case law.

The judiciary is not the body that should fill the gap and create federal paternity law. The lawmaker must deliberate with exceptional care to define the critical, legal relationships between family members. Even with attentive research and analysis, state legislatures have developed multiple valid approaches to paternity law. A court is not in the position to weigh the various merits of each paternity statute and pick the one that best represents the needs of its constituents. That responsibility is constitutionally mandated and most practically assigned to the legislature.<sup>148</sup> It is illogical to presume that Congress would use two words in a definition section to delegate to state courts the power to determine federal paternity law, especially when there was no existing federal law to guide them.<sup>149</sup>

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145. *Holyfield*, 490 U.S. at 48.

146. *Id.* at 47.

147. *Yarborough v. Yarborough*, 290 U.S. 202, 211 (1933).

148. U.S. CONST. art. I, § 1.

149. This is not to say that the U.S. Supreme Court cannot address paternity questions. It heard cases about due process of, and equal protection for, unwed fathers under state law throughout the 1970s. See *Lehr v. Robertson*, 463 U.S. 248 (1983); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammad*, 441 U.S. 380 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972). The Court must make constitutional determinations, but its role is not to create the law.

As with all tricky statutory interpretation cases, the answer is ultimately a battle of presumptions. The presumption from *De Sylva* is strongest: when Congress writes laws dependent upon familial relationships it “requires a reference to the law of the State which created those legal relationships.”<sup>150</sup> *Acknowledge* and *establish* are legal terms of art in a state-dominated area of law that do not require even more specific invocations of state law.<sup>151</sup>

Additionally, the presumption that Congress would not use state law because states were the culprit behind Indian child removal can be rebutted because laws of paternity are objective and of general applicability. Unlike questions that require courts to define adequate parenting, which state courts were manipulating and which was the initial target of ICWA,<sup>152</sup> acknowledging and establishing paternity are generally dependent upon paperwork and genetic testing. This limits the opportunities for state court abuse. If these requirements were to become onerous or unjust, they would have a greater likelihood of being democratically overturned because all residents, not just Indians, are affected by them.<sup>153</sup>

The foregoing analysis presents the question as a decision between applying state or federal law because that is where the debate in the Supreme Court has centered. Nevertheless, courts could apply the imperfectly fulfilled state law standard. This fails not only because I have shown that state law applies, but also this standard eliminates the benefits of the federal and state law standards rather than multiplying them. By starting with state law and then allowing untold variation in its application, Alaska and Arizona courts effectively create no standard. An unworkable

150. *De Sylva v. Ballentine*, 351 U.S. 570, 580–82 (1956).

151. See *In re Adoption of B.B.*, 2017 UT 59, ¶ 188, 417 P.3d 1, 54 (Lee, J., dissenting); Brief of *Amici Curiae* National Council for Adoption in Support of Petitioners at 7, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399), 2013 WL 749938 (“Thus, an ‘acknowledgment of paternity’ remains a term of art in the context of establishing paternity.”).

152. See 25 U.S.C. § 1901(5) (2012) (“[T]he States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”).

153. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Caban*, 441 U.S. at 380; *Quilloin*, 434 U.S. at 246; *Stanley*, 405 U.S. at 645.

standard, even in the guise of adhering to ICWA's purpose, is detrimental to Indian parents.

This standard still relies upon state law for its analysis, and thus pours state law back into ICWA where Congress may have intended to drain it.<sup>154</sup> States still have wide variability in the requirements for acknowledging and establishing paternity, and so there would be no uniformity from state to state. Even within jurisdictions, the reasonableness analysis creates a focus on specific facts could lead to huge variations in outcomes. This is especially likely because *Jared P.*<sup>155</sup> and *Bruce L.*<sup>156</sup> provide no guidance as to which facets of the law require perfect or just reasonable compliance. This adds an unnecessary complication for judges. And although courts successfully apply the reasonableness standard in many contexts, those contexts are generally vaguer than the specific state paternity statutes.<sup>157</sup>

The dissent in *In re Adoption of B.B.* highlights one problem of having a standard that is too informal for establishing paternity because of its implications for notice.

A family who wishes to adopt a child of Indian heritage has a statutory duty to provide notice to any *parent*. But if *parent* includes anyone who has vaguely *acknowledged* paternity in some informal ways, the adopting family will have no way to know how to fulfill its obligations under ICWA. And an Indian mother would have no way of assuring that her child will actually be given to the adoptive couple, even after her own parental rights have been terminated. . . . Surely Congress didn't mean to require biological mothers and adoptive families to give notice to persons whose *acknowledgment* of paternity was so vague and informal that they cannot reasonably be identified.<sup>158</sup>

Therefore, this imperfectly fulfilled state law standard also abandons the benefits of applying state law: notice, predictability, and stability.

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154. *Adoption of B.B.*, 2017 UT 59, ¶ 65, 417 P.3d at 23 (majority opinion).

155. *Jared P. v. Glade T.*, 209 P.3d 157 (Ariz. Ct. App. 2009).

156. *Bruce L. v. W.E.*, 247 P.3d 966 (Alaska 2011).

157. *Adoption of B.B.*, 2017 UT 59, ¶ 71 nn.26–27, 417 P.3d at 25–26 nn.26–27.

158. *Id.* ¶ 172, 417 P.3d at 51 (Lee, J., dissenting).

Such uncertainty as to which elements of the law are flexible may also raise important questions of fairness and due process. If a state's requirements for acknowledging and establishing paternity are constitutional, then it appears unjust for some fathers to be required to perfectly comply while others are not. This is especially true when the stakes are so high—the fundamental relationships of parent to child and child to tribe. ICWA as a whole and in part has sparked arguments of unconstitutionality, some of which allege that Indians' unique treatment by Congress is impermissibly rooted in racial preference rather than political status.<sup>159</sup> Applying this standard could raise more of these questions because it appears to grant paternalistic leniency to Indian fathers rather than help fulfill the purposes of ICWA.

### *B. Principles to Guide the Amendment*

Though Supreme Court precedent and legal presumptions show that courts should currently apply state law to define *acknowledge* and *establish*, doing so is problematic for three reasons: (1) state courts have historically abused their power to disproportionately remove Indian children, (2) state law fails “to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families[.]”<sup>160</sup> and (3) an unwed father's protections under ICWA could vary from state to state. An amendment that creates federal paternity law for ICWA contexts could rectify these issues. This amendment should provide an Indian father with a choice to acknowledge and establish his paternity by either fulfilling the enumerations of a federal statute or invoking tribal law and custom.

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159. See Brief for Petitioners at 17–18, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399), 2013 WL 633597; Brief of *Amici Curiae* National Council for Adoption in Support of Petitioners at 9–10, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399), 2013 WL 749938. See generally *Rice v. Cayetano*, 528 U.S. 495 (2000); *Morton v. Mancari*, 417 U.S. 535 (1974).

160. 25 U.S.C. § 1901(5) (2012).



### 1. Prevent state court abuse

As I've explained,<sup>161</sup> the risk for state court abuse of state paternity schemes is less than it is with other aspects of child welfare law<sup>162</sup> because the paternity statutes are generally specific and objective. In the new federal paternity scheme, Congress should follow that same pattern to combat any lingering opportunities for state courts and institutions to abuse their power.

The Uniform Parentage Act is a good model<sup>163</sup> because it carefully enumerates the presumption of parentage,<sup>164</sup> voluntary acknowledgement of paternity,<sup>165</sup> accommodations for genetic testing,<sup>166</sup> and alternative methods of establishing paternity.<sup>167</sup> This is not to say that parties will not find a way to litigate and dispute issues of signatures, the efficacy of genetic tests, or the timing of these elements. But having a clear statement of the law through statute is preferable to a reasonableness standard because there is less room for the fact finder to introduce subjectivity that harms the rights of Indian fathers and tribes. A middle-class white father's genetic test is just as suspect as that of an Indian father.

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161. See *supra* Sections III.A, IV.A.

162. Statutes that speak in generalities rather than giving concrete actions and deadlines create opportunities for state courts to establish precedent that disadvantages Indian parents. Examples of this within ICWA include the debate over "good cause," 25 U.S.C. § 1915(a)–(b), and "active efforts," 25 U.S.C. § 1912(d). See also Megan Scanlon, *From Theory to Practice: Incorporating the "Active Efforts" Requirement in Indian Child Welfare Act Proceedings*, 43 ARIZ. ST. L.J. 629 (2011); Denise L. Stiffarm, *The Indian Child Welfare Act: Guiding the Determination of Good Cause to Depart from the Statutory Placement Preferences*, 70 WASH. L. REV. 1151 (1995).

163. The Uniform Parentage Act focuses on the equality of parental rights. That emphasis has led the National Conference of Commissioners on Uniform State Laws to update the Act in 2017 to reflect modern parents, considering *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which declared same-sex marriage a constitutional right, and including surrogacy arrangements. While questions related to these types of paternity have not been highly litigated within ICWA contexts, they are likely to be increasingly common. By adopting some of these provisions, Congress could address the issues more efficiently than leaving their resolution to courts.

164. UNIFORM PARENTAGE ACT art. II (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2017).

165. *Id.* art. III.

166. *Id.* art. V.

167. *Id.* art. VI.

## 2. Account for tribal custom

State law and courts' current application of federal law do not adequately account for tribal paternity law and customs. Justice Himonas in *In re Adoption of B.B.* writes that it would be "unfair and an unwarranted intrusion by states into Indian customs and practices" to apply state law.<sup>168</sup> But his implementation of a uniform federal reasonableness standard contains no room for variability per different tribal customs or codes. In fact, he explicitly rejects such.<sup>169</sup> This view is ultimately incompatible with the purpose of ICWA because accounting for tribal law and customs is the best way to respect and protect Indian children, families, and tribes.

The use of tribal law to determine paternity is not a new idea.<sup>170</sup> The New Jersey Supreme Court once concluded that

Congress intended to defer to state or tribal law standards . . . so long as these approaches are permissible variations . . . within the general contemplation of Congress when it passed the ICWA, and provide a realistic opportunity for an unwed father to establish an actual or legal relationship with his child.<sup>171</sup>

The Navajo Nation also advocates for the use of tribal law, though it argues from the position that state law is the greatest threat to tribal interests, not an acceptable alternative like the New

168. *In re Adoption of B.B.*, 2017 UT 59, ¶ 69, 417 P.3d 1, 24.

169. *Id.* ¶ 70, 417 P.3d at 24 ("As with state law, the application of tribal law to the definition of a parent under ICWA would result in a lack of nationwide uniformity. Based on *Holyfield*, we determine that Congress could hardly have intended that result.").

170. See Kevin Heiner, *Are You My Father? Adopting a Federal Standard for Acknowledging or Establishing Paternity in State Court ICWA Proceedings*, 117 COLUM. L. REV. 2151, 2168–69 nn.144–45 (2017) (citing comments by the Agua Caliente Band of Cahuilla Indians, Saint Regis Mohawk Tribe, and Tulalip Tribes for the 2015 guidelines that recommend the use of tribal law in the definition of "parent"); Comment Letter from Agua Caliente Band of Cahuilla Indians to Elizabeth Appel, BIA (May 19, 2015), <http://www.regulations.gov/document?D=BIA-2015-0001-1181> ("Re: Proposed ICWA Regulations"); Comment Letter from Saint Regis Mohawk Tribe to Elizabeth Appel, BIA (May 19, 2015), <http://www.regulations.gov/document?D=BIA-2015-0001-1329> ("Re: . . . Regulations for State Courts and Agencies in Indian Child Custody Proceedings"); Comment Letter from Tulalip Tribes to Elizabeth Appel, BIA (May 19, 2015), <http://www.regulations.gov/document?D=BIA-2015-0001-0656> ("Re: . . . Regulations for State Courts and Agencies in Indian Child Custody Proceedings").

171. *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 935 (N.J. 1988) (citations omitted).

Jersey Supreme Court found.<sup>172</sup> The tribe explains that using tribal law harmonizes with Congress's "underlying intent to infuse tribal law and customs particular to family relations . . . into child welfare matters involving Indian children."<sup>173</sup> Family relations are integral to determining tribal membership, an area of law squarely within tribal sovereignty.<sup>174</sup> "Tribes' sovereign powers to regulate membership would be frustrated if state law governed 'paternity.'"<sup>175</sup> Despite the discussion of applying tribal law, it is regrettable that state courts have not seriously considered the option enough to implement it.<sup>176</sup>

Congress's recognition of the importance of incorporating tribal law is evident in other provisions of ICWA. For example, *extended family member* and *Indian custodian* are defined in terms of tribal custom.<sup>177</sup> Even more importantly, the role of the tribal court throughout ICWA demonstrates Congress's trust in tribes. Tribal courts have the opportunity to "establish a different order of preference"<sup>178</sup> in the placement of children, and the standards used in these decisions are the "prevailing social and cultural standards of the Indian community in which the parent or extended family resides or . . . [maintains] social and cultural ties."<sup>179</sup> Tribes are

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172. Brief for the Navajo Nation as Amicus Curiae Supporting Affirmance at 10–11, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399), 2013 WL 1399374 ("States could create laws in contravention of 25 U.S.C.A. § 1921 . . . to eliminate parental rights altogether under ICWA.").

173. *Id.* at 9.

174. *See id.* at 10.

175. *Id.*

176. It is understandable that the courts would lack this imagination, given the U.S. Supreme Court precedent focusing on the interpretation of family law terms and *Holyfield's* emphasis on federal law uniformity. Nevertheless, tribal law is a logical choice for many reasons. First, ICWA shows a strong preference for tribal courts with jurisdictional provisions. 25 § U.S.C. § 1911 (2012). These courts have expertise and the right to apply tribal law rather than state law in many matters. Child welfare proceedings should not be the exception when tribal courts must apply state law. And when the state is exercising its concurrent jurisdiction over a child domiciled off the reservation, it is just as foreign to the court to apply federal law as it would be to apply tribal law. Second, some tribal courts have extensive experience applying ICWA. *See, e.g., Indian Child Welfare*, PONCA TRIBE INDIANS OKLA., <http://ponca.com/indian-child-welfare.html> (last visited Jan. 14, 2019); *Cherokee Nation Indian Child Welfare*, CHEROKEE NATION, <http://www.cherokee.org/Services/Indian-Child-Welfare> (last visited Jan. 14, 2019).

177. 25 U.S.C. § 1903(2), (6).

178. *Id.* § 1915(c).

179. *Id.* § 1915(d).

given, at a minimum, concurrent jurisdiction over child welfare proceedings; their judgments are entitled to full faith and credit.<sup>180</sup> Congress not only considered but also prioritized the use of tribal law and custom; there is no reason that the determination of paternity should be any different.<sup>181</sup>

It is impractical to defer entirely to tribal law for the definitions of *acknowledge* and *establish* for the simple reason that not all 567 federally recognized tribes have laws addressing paternity. Tribes that have well-developed legal systems like the Navajo Nation,<sup>182</sup> St. Regis Mohawk,<sup>183</sup> Snoqualmie,<sup>184</sup> Northern Arapaho,<sup>185</sup> or Spirit Lake Nation<sup>186</sup> have codes that are on point. Other federally recognized tribes like the Mississippi Band of Choctaw Indians,<sup>187</sup> Cheyenne-Arapaho of Oklahoma,<sup>188</sup> or Shingle Springs Band of Miwok Indians<sup>189</sup> may not have tribal codes or their codes do not address the topic. If ICWA refers solely to tribal law as the standard for *acknowledge* and *establish*, Congress would create even more gaps; courts would have to decide yet again whether to apply state or federal law in the absence of tribal law.

180. *Id.* § 1911.

181. The Navajo Nation argues that it is “commonsense for ICWA to defer to tribal laws on family relations.” The question the tribe raises is a valid one: “Why would ICWA apply tribal law or custom to determine who is an ‘extended family member’ but not to determine who has acknowledged or established paternity to be a ‘parent’?” Brief for the Navajo Nation as Amicus Curiae Supporting Affirmance at 11, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399), 2013 WL 1399374.

182. *In re Guardianship of T.S.E.J.*, 10 Am. Tribal Law 57, 2011 WL 3625086 (Nav. Sup. Ct. 2011).

183. Saint Regis Mohawk Tribe Family Support Act, [https://www.srmt-nsn.gov/\\_uploads/site\\_files/FINAL\\_DRAFT\\_-\\_Saint\\_Regis\\_Mohawk\\_Tribe\\_Family\\_Support\\_Act.pdf](https://www.srmt-nsn.gov/_uploads/site_files/FINAL_DRAFT_-_Saint_Regis_Mohawk_Tribe_Family_Support_Act.pdf).

184. An Act Relating to Indian Child Welfare, 13 Tribal Council Act § 2, [http://www.snoqualmietribe.us/sites/default/files/icw\\_code\\_2015.pdf](http://www.snoqualmietribe.us/sites/default/files/icw_code_2015.pdf).

185. Family Support Ordinance, 10 Northern Arapaho Code, <http://www.northernarapaho.com/test2/sites/default/files/documents/files/NA%20Code%20Title%2010%20Family%20Support%205-13-08.pdf>.

186. Spirit Lake Nation Law and Order Code, Children’s Code, Resolution No. A05-03-160, [http://www.spiritlakenation.com/data/upfiles/media/Title\\_9\\_Domestic\\_Relations.pdf](http://www.spiritlakenation.com/data/upfiles/media/Title_9_Domestic_Relations.pdf).

187. 9 Choctaw Domestic Relations Code, [http://www.choctaw.org/government/court/pdf/TITLE%2009%20DOMESTIC%20RELATIONS%20\(rev%2010-11-2016\).pdf](http://www.choctaw.org/government/court/pdf/TITLE%2009%20DOMESTIC%20RELATIONS%20(rev%2010-11-2016).pdf).

188. CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA CONSTITUTION AND BY-LAWS, [http://thorpe.ou.edu/constitution/Chyn\\_aph.html#art1](http://thorpe.ou.edu/constitution/Chyn_aph.html#art1).

189. Shingle Springs Band of Miwok Indians Family Code, <http://www.shingle-springsrancheria.com/ssr/wp-content/uploads/documents/codes/Family%20Code.pdf>.

Nevertheless, when tribes have code and customs for establishing paternity, courts should consider it. Tribal codes are likely to have specific enumerations of steps for establishing paternity like state standards or the proposed federal standard.<sup>190</sup> Using tribal custom could lead to some of the same issues of vagueness or subjectivity as a reasonableness standard. However, tribal courts' experience and procedures for incorporating cultural standards into their judgements sufficiently mitigate this concern. Courts may look to five sources for customary law: the parties to the litigation, inherent knowledge of tribal judges, secondary literature about tribal customs and tradition, people of the community (often elders), and the written work of tribal community members.<sup>191</sup> These same sources are available to provide cultural context for establishing paternity. State courts have equal access to evidence of tribal custom as tribal courts with the exception of the inherent knowledge of the tribal judge. This requires more of a court than simply examining the date of a form, but the additional efforts are worthwhile because of the importance of maintaining Indian families and Indian tribes.

Moreover, state courts should be willing to apply this process because it represents the same fairness paradigm that led to the use of the reasonableness and imperfectly fulfilled law standards.<sup>192</sup> Courts permitted to examine tribal custom can uphold the protections for a father who represents himself as the parent of his child in a way that is recognized by his tribal community even though he may not have completed all the requirements of state law. This outcome seems more just because it avoids disproportionate consequences.

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190. See, e.g., Saint Regis Mohawk Tribe Family Support Act § IV, [https://www.srmt-nsn.gov/\\_uploads/site\\_files/FINAL\\_DRAFT\\_-\\_Saint\\_Regis\\_Mohawk\\_Tribe\\_Family\\_Support\\_Act.pdf](https://www.srmt-nsn.gov/_uploads/site_files/FINAL_DRAFT_-_Saint_Regis_Mohawk_Tribe_Family_Support_Act.pdf); An Act Relating to Indian Child Welfare, 13 Tribal Council Act § 2 (8.1.1), [http://www.snoqualmtribe.us/sites/default/files/icw\\_code\\_2015.pdf](http://www.snoqualmtribe.us/sites/default/files/icw_code_2015.pdf).

191. Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57, 89-91 (2007).

192. See *In re Adoption of B.B.*, 2017 UT 59, ¶ 68, 417 P.3d 1, 24 ("Utah's requirements for establishment of paternity by unwed fathers are notoriously strict." (internal quotation marks omitted)); *id.* ¶ 72, 417 P.3d at 26 ("This approach is consistent with ICWA's liberal administration.").

### 3. Accepting and encouraging variation

The most determinative ICWA case has been *Mississippi Band of Choctaw Indians v. Holyfield*, and my proposed congressional amendment appears to reject its key rationale and benefit: uniformity. Recognizing the legitimacy of tribal law and customs is a more important goal than uniformity. Because of different tribal laws and customs, variation is a desired outcome, even the best outcome. The U.S. Supreme Court supplied uniformity as a goal, and it consequently must be secondary to Congress's general policy of tribal self-determination and ICWA's specific methods of helping Indian tribes to survive.<sup>193</sup>

Expecting and allowing variation is an integral part of the congressional goal of tribal self-determination. Announced by President Richard M. Nixon in 1970,<sup>194</sup> this policy provides the opportunity for Indian tribes to "promote their tribal economies, build governmental infrastructures, provide law and order, manage tribal natural and cultural resources, meet the healthcare and educational needs of their members, and perform other governmental functions" "like other . . . sovereign governments."<sup>195</sup> This was a pivot away from the assimilationist, paternalistic, and racist policies that the U.S. government previously pursued. ICWA is one of many acts<sup>196</sup> that recognizes tribes' freedom and authority "to make their own laws and be ruled by them."<sup>197</sup> Liberty inevitably leads to uniqueness; such was the result with fifty different states and such is the result with 567 federally recognized tribes. It is incongruous for Congress to promote self-determination with so much legislation, including within some provisions of ICWA, only to ignore the opportunity to extend it by accommodating tribal paternity law and custom out of concern for uniformity. Expressly looking to tribal law to establish paternity is

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193. 25 U.S.C. § 1901(5) (2012).

194. Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 17 (2015).

195. *Id.* at 3.

196. *Id.* at 46 (giving other examples of self-determination programs like Tribal Temporary Assistance for Needy Families, community service block grants, Native employment works, Head Start, and grants for battered women's shelters).

197. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

another needed symbol that the U.S. federal government and American society respect tribal sovereignty and culture.

Uniformity is still possible procedurally. All Indian fathers will be able to establish paternity by looking to the same ICWA amendment which will direct them to either examine enumerated statutory steps for acknowledging paternity or look to the customs and laws of their own tribes.

Moreover, variation is not inherently offensive to the principles of *Holyfield*. The Court was not concerned about variation in the rights of one Indian father compared to another; its concern was that “different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another. . . .”<sup>198</sup> An Indian father’s rights should not be dependent upon actors outside himself, such as the mother of his child giving birth in another state. Under my proposal, the variation in the father’s rights are controlled entirely by the father. He is always a member of the same tribe, and so any differences between the tribal standard and ICWA statutory requirements for paternity will be constant. With the federal statutory options also serving as a valid way to establish paternity, all fathers would be guaranteed the same process to claim their parental rights.

### *C. Responding to Current ICWA Amendment Proposals*

I am not alone in advocating that Congress act to correct ICWA; Kevin Heiner also reaches this conclusion in his article, “Are You My Father? Adopting a Federal Standard for Acknowledging or Establishing Paternity in State Court ICWA Proceedings.”<sup>199</sup> The goal of uniformity guides his analysis and his proposed statute. This is a good objective in light of *Holyfield*, but it is irredeemably shortsighted. Heiner’s amendment would provide specificity, certainty, and flexibility for fathers establishing paternity under ICWA, but it would not eliminate different outcomes based upon location of the father because three of its options for establishing paternity under ICWA look to state law procedures.<sup>200</sup> Thus ICWA

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198. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 46 (1989).

199. Heiner, *supra* note 170, at 2151.

200. *Id.* at 2182–83.

determinations ultimately lie in the hands of state legislatures, with all the associated risks, rather than in the care of federal or tribal actors. The father's other two options of using genetic testing or representing himself as the father through statements or financial support are more demonstrative of a reasonableness standard.<sup>201</sup> Having five options to establish paternity resolves the immediate questions of what fathers should do, but these do not represent a solution that encourages tribal self-determination, dignity, and autonomy—a broader movement of which ICWA was only one part. My proposal provides at least as much uniformity as Heiner's amendment because there would also be uniformity of the procedures to guide Indian fathers despite the variation. Heiner's suggestion would allow variation based on location while mine allows variation based upon tribal membership.

While Heiner and I both agree that Congress should act, he aptly indicates that the last serious attempt to amend ICWA in 2003 fell through.<sup>202</sup> This does not produce great confidence that Congress will respond quickly. Nevertheless, the increased litigation regarding the standards of paternity should be ample motivation to act.

## V. CONCLUSION

By enacting ICWA, Congress was remarkably active in its role as the guardian of Indian tribes and families. This legislation was especially appropriate because of the extremely troubling nature of the problem. Congress's solution was imperfect, however, because of its silence about the definition of two critical words—*acknowledge* and *establish*—as they relate to paternity. State courts have reacted with three standards for establishing paternity. Current case law shows that the courts must apply a state law standard. Nevertheless, Congress must speak again to correct the flaws from what it left unsaid and to fix the problems that arise with a state law standard. An amendment to ICWA that creates federal steps for establishing paternity or that allows paternity to be established through tribal custom and law is necessary. By amending ICWA, Congress will give Indian tribes the space they deserve to vocalize

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201. *Id.*

202. *Id.* at 2178.



their own answers to critical questions – “Who am I?” “To whom do I belong?” and “What are my responsibilities to those I love?” – for their member parents and children.

*Carlie Smith\**

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